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No. ——

IN THE
# Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,
and
BRYAN A. MAYHEW,
*Petitioners,*

v.

AMERICAN AIRLINES, INC.,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the contempt/procedural due process principle of *Mine Workers v. Bagwell*, 512 U.S. 821 (1994), requires that a compensatory civil contempt case involving a complex injunction, disputed factual issues, and a serious sanction for completed acts (here a $45,500,000 damages award) be adjudicated in accord with the basic due process principles governing the conduct of civil damages cases generally embodied in the Fifth Amendment of the United States Constitution—and, in the Federal Courts, the Federal Rules of Civil Procedure—and not through expedited procedures of a summary nature?

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## PETITION FOR A WRIT OF CERTORARI

The Allied Pilots Association, Richard T. LaVoy, and Brian A. Mayhew pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in *American Airlines, Inc. v. Allied Pilots Ass'n*, No. 99-10814 (Sept. 21, 2000, as revised Sept. 27, 2000).

## DECISIONS BELOW

The opinion of the Court of Appeals is reported at 228 F.3d 574, and is reproduced as Appendix A in the separately bound appendix to this Petition ("Pet. App.") at pp. 1a-23a. The order of the United States District Court for the Northern District of Texas judging the Petitioners in civil contempt is unreported and is reproduced as Appendix B at Pet. App. 24a-28a. The District Court's findings of fact and conclusions of law on contempt liability filed with its contempt order is unreported and is reproduced as Appendix C at Pet. App. 29a-38a. The District Court's final opinion on contempt liability and damages is reported at 53 F.Supp.2d 909, and is reproduced as Appendix D at Pet. App. 39a-96a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered September 21, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law . . ."

## STATEMENT OF THE CASE

### I. THE DISTRICT COURT PROCEEDINGS

*A. Introduction.* In this case, the United States District Court for the Northern District of Texas, Wichita Falls Division (Kendall, D.J.), found that petitioners—the Allied Pilots Association ("APA"); its President, Richard LaVoy; and its Vice-President, Brian Mayhew—violated the District Court's temporary restraining order ("TRO") and, on the basis of that liability finding, imposed on petitioners a $45,500,000 compensatory civil contempt sanction in favor of respondent American Airlines, Inc. ("American").

The expedited liability proceedings that resulted in this judgment were summary in their nature:

- a February 10[1] American motion for a TRO, a non-evidentiary hearing that afternoon, and the District Court's issuance of the TRO at 4:00 p.m. that day;
- a February 11 American motion for an order to show cause why defendants (petitioners here) should not be held in contempt and a District Court show cause order—both stated in general and conclusory terms and both served simultaneously on petitioners at 5:00 p.m. that afternoon;
- a February 12 hearing convened at 10:00 a.m. and concluded that afternoon; and
- a February 13, 10 a.m. conclusive liability finding.

The "damages" proceedings were similarly abrupt and irregular: a February 17 damages hearing presentation by American affording petitioners no prior discovery and at which the District Court precluded petitioners from revisiting the issue of liability while permitting American to supplement its liability case; an April 12 damages hearing presentation by

[1] All dates are in 1999 unless otherwise specified.

petitioners, at which the District Court, while precluding petitioners from presenting liability witnesses, again permitted American to supplement its liability evidence; and an April 15 judgment of $45,500,000 from the bench.

In detail, the District Court proceedings unfolded here as follows.

*B. The TRO Proceedings.* This case arose out of a labor dispute between American and APA, a national labor union certified under the Railway Labor Act ("RLA") to represent some 9,300 American pilots. The dispute stemmed from American's acquisition of Reno Air, Inc. and American's announced intent to operate Reno without observing the terms and conditions of the relevant collective bargaining agreement. On February 5, after negotiations over the integration of Reno failed, APA members began a sick-out.

On February 10, American filed its complaint against APA and its national officers, directors and bargaining committee for injunctive relief and damages, alleging that the sick-out violated the RLA. With the complaint, American also filed a motion for a TRO. On that same day, the District Court held a *non-evidentiary* hearing, lasting approximately two hours, and then issued its TRO at 4:00 p.m. R. 181, 114.

The TRO contained one generally prohibitory paragraph enjoining the defendants and all those legally associated with them from, in essence, authorizing the continuation of, or participating in, the sick-out.[2] The TRO also stated one general command, requiring the defendants and those acting in concert with them to "take all reasonable steps in their power" to prevent the continuation of the sick-out. The TRO, lastly, imposed a number of specific, affirmative obligations, requiring the defendants, *inter alia*, to: direct the APA

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[2] The complete text of the TRO is to be found *infra* pp. 29-30 in the Addendum hereto.

members "to resume their normal working schedule"; issue a notice to the APA membership, "by the most expeditious means possible, . . . of the issuance, content and meaning of the TRO"; instruct the members to "cease and desist" from engaging in the sick-out; post the TRO notice on APA's web site; include the contents of the TRO "on all recorded telephone hotlines"; report all compliance efforts to the court by 12:00 noon on February 12, 1999.

*C. APA's TRO Compliance Efforts.* Immediately after the February 10, 4:00 p.m. issuance of the TRO, APA, through LaVoy and Mayhew, began its compliance efforts by drafting, and issuing at 7:30 p.m. that night, an initial alert on the APA telephone hotline and web site that quoted the entirety of the TRO's prohibitory paragraph and advised the membership of the following: the District Court has issued a TRO enjoining APA; APA attorneys are reviewing the TRO; APA "will comply with the Judge's Order"; and APA will provide the membership "with more specific information about the [TRO] as soon as we have had an opportunity to complete our review." The alert—before quoting the TRO's prohibitory paragraph directed at "Defendants . . . their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders"—correctly identified the "defendants" referred to in that paragraph, who were not otherwise identified in the text of the TRO, as "APA's national officers, board of directors, and general counsel." R.126.[3]

The following day, February 11, APA issued its full TRO notice/return-to-work-directive to the membership as called

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[3] For all relevant purposes, the definition was accurate; the defendants were the APA, its individual national officers, its individual board members, and its negotiating committee. The only technical inaccuracy was its erroneous inclusion of APA's general counsel in its identification of the defendants.

for in the TRO. The notice/directive quoted the TRO in full; instructed all pilots to "resume their normal working schedule" (as specifically directed by the TRO) and to "otherwise comply" with the TRO; and stated that the APA and its officers "do not authorize, ratify or condone any sick-out or slow down or violation" of the TRO. R. 157-58. By 2:00 p.m. on February 11, the full notice was posted on all national and local APA web sites, recorded by LaVoy on the APA hotline, and sent via e-mail to all the pilots for whom APA had an e-mail address. R. 150-51.

LaVoy also distributed return-to-work directives to the APA's national and local officers and committee members instructing them to: comply with the TRO; inform all members of the TRO's issuance and distribute copies of the TRO to each member; instruct all members to resume their normal working schedule and otherwise comply with the TRO; advise all members that the TRO prohibits any sick-out or slowdown; and to post the TRO on all bulletin boards and local APA web sites. APA also issued a written script for volunteer pilots who were staffing the union's phone watch, which consisted of similar instructions. R. 152-55

*D. The Show Cause Motion and Order.* Also on February 11—some 24 hours prior to the time set in the TRO for APA to report its compliance efforts to the court—American filed a motion for an order to show cause why APA, LaVoy, Mayhew, and the other defendants should not be held in contempt.

The motion stated in the most general terms that: (1) the number of pilots on the sick list was greater at 10:51 a.m. on February 11 than the number on the list at 5:04 p.m. on February 10; (2) the February 10 "hotline issued by APA by telephone and internet is not in compliance with the Court's order," and (3) "the APA and the individual named defendants have not taken all reasonable steps in their power to prevent continuation of the pilot sick-out against

American." R. 119-120. The attached declarations and memorandum basically tracked rather than elaborated on the motion's contempt allegations. R. 121-26, 135.

The District Court immediately signed the proposed order to show cause that American submitted with its motion. R. 130. The order required petitioners to file "an answer specifically admitting, denying, or responding to the Motion for Contempt" by 9 a.m. February 12 and to appear and defend the contempt charge by 10 a.m. February 12. *Id.* The order did not elaborate on the contempt allegations. APA's counsel received service of American's motion, the supporting declarations and memorandum, and the signed show cause order together at 5:00 p.m., February 11. R. 140.

*E. The February 12 Contempt Hearing.* At 9:00 a.m. on February 12, APA, LaVoy, and Mayhew filed an answer and a motion to dissolve the order to show cause, both of which maintained that: (1) the February 10 alert did not, on its face, violate the TRO; (2) as of the evening of February 10, the defendants had not yet had adequate time to comply fully with the TRO; (3) compliance was effectuated by the full TRO notice/return-to-work directive issued on February 11; and (4) "[t]o conduct a contempt adjudication of defendants in the manner prescribed denies defendants due process of law, including ... adequate notice, an opportunity to appear," and an "opportunity to prepare a defense." R. 140-41.

At 10:00 a.m. on February 12, the District Court convened the contempt hearing. The only defendants in attendance were those who were already in the Dallas-Fort Worth area—LaVoy, Mayhew, APA Secretary-Treasurer Morgan, and several members of APA's negotiating committee. Tr. (Feb. 12) 5.

At the outset of the hearing, American made clear that "we're not going to ask for anything other than a coercive fine today. ... that exists day to day until this union gets the pilots back to work." *Id.* at 11-12. American's liability case consisted of the following:

- An American vice-president testified that the number of pilots on the sick list had increased during the first 15½ hours after the entry of the TRO—*viz.*, from 4:00 p.m. February 10 to 10:51 a.m. February 11—and that flight cancellations increased also. *Id.* at 15.
- American then called defendants LaVoy, Mayhew, and Morgan as witnesses. The questioning by American focused principally on the mechanics of the drafting and dissemination of the February 10 telephone hotline and internet bulletin and on the APA's "phone watch" informing pilots who called the APA headquarters of the issuance of the TRO. *Id.* at 35-54, 98-107.
- Finally, American then called Larry Foster and Dennis Patterson, local APA officials from the union's Dallas-Fort Worth "domicile" and questioned them primarily regarding pre-TRO conduct. *Id.* at 127-48, 170-84.[4]

The only questioning that was directed at any points that became a basis for the District Court's liability findings was the following:

- American and the court questioned LaVoy and Mayhew as to the intent behind the sentence of the February 10 alert that defined the defendants referred to in the TRO paragraph excerpted in that message. LaVoy responded that he believed the sentence was accurate and factual; Mayhew testified that he wanted

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[4] "Domicile" is the term used by APA to describe its 10 constituent local organizational units. Foster and Paterson testified that, prior to the issuance the TRO, his domicile operated a "phone tree" in which three to four volunteer pilots called APA members in that domicile and encouraged the job action. After the TRO issued, Foster instructed his phone volunteers to cease making these calls; the volunteers were then given the "phone watch" script and directed to follow it when receiving calls. *Id.* at 142-43.

to convey that the union and its officials "were under the gun." *Id.* 47-48; 105-06.

- American asked LaVoy whether a sentence in the February 10 and February 11 messages stating that "[t]his legal maneuvering by management does not bring us any closer to a negotiated settlement" was intended to encompass the TRO and whether LaVoy had considered the impact of that sentence; LaVoy responded that the sentence referred only to American's decision to pursue litigation rather than negotiation and that it was simply an editorial comment indicating that APA contested the litigation. *Id.* at 48-50.
- American questioned LaVoy on whether APA had set up a national "phone tree" to call APA's 9,300 members; LaVoy confirmed that no "phone tree" had been set up because of the volume of incoming calls. *Id.* at 32. American inquired whether the APA directives were phrased in the form of a "personal message"; LaVoy stated that he believed the APA hotline—which was recorded in his own voice—and written return-to-work directives *were* personal messages from the leadership. *Id.* at 137, 224-26.

After eliciting this testimony, American closed its case, repeating its request that the District Court impose "a coercive fine . . . that . . . exist[s] day to day until they have reached compliance." *Id.* at 234.

At the conclusion of American's case—given the generality of the notice provided, the less-than 24-hour period within which to prepare a defense, and American's representation that the hearing concerned prospective coercive relief liability and not compensatory damages for past misconduct—petitioners could do nothing more than recall LaVoy, who testified to the APA's compliance efforts, particularly the February 11 TRO notice/return-to-work directives. *Id.* at 188-222.

The District Court thereupon concluded the hearing and informed the parties that a ruling would issue the following morning. *Id.* at 239.

*F. The Contempt Order, Findings of Fact, and Conclusions of Law.* At 10:00 a.m. the next morning (February 13), the District Court issued its order concluding that APA, LaVoy, Mayhew were in contempt.[5] The District Court announced that its sanction would be an award of compensatory damages to American, the amount of which would be determined at a subsequent hearing. Foreshadowing the magnitude of its as-yet undetermined damages finding, the District Court then ordered that the APA, LaVoy, and Mayhew pay into the court registry $10 million, $10,000, and $5,000 respectively, as a deposit "toward the compensatory civil contempt fine likely to be ordered in this case," which the Court opined was likely to be "eight figures." Pet App. 28a. As the District Court put things in its order, "when all the dust clears, all the assets

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[5] Throughout the February 12 hearing, the District Court played an independent and active role as a complaining party, a role having nothing to do with its role as a disinterested magistrate adjudicating a law case:

- During the hearing, the District Court interjected to relate anonymous phone calls and messages the court had received from "irate" air travelers. *See, e.g., id.* at 79-80, 147 ("[M]y phone is ringing off the wall back here, and most of the calls that I'm getting are urging me on, telling me, in essence, they think death by lethal injection would be too good for the American Airlines pilots.").

- The District Court questioned LaVoy, Mayhew, Morgan, Foster, and Patterson on the size of their salaries and the source of their training, and *sua sponte* called all of the members of APA's negotiating committee who were present solely to elicit this same testimony. Tr. (Feb. 12) 55, 124, 138-39, 161, 163-79, 185. This "evidence" featured prominently in the Court's contempt order, where the court noted that many of the pilots "were taught to fly jets at taxpayer expense in the U.S. military, which of course enables them to earn their six figure incomes" and suggested that such pilots were not justified in seeking "more money . . . merely because American bought a small airline." Pet. App. 26a.

of the Union, including their strike war chest, will be capable of being safely stored in the overhead bin of a Piper Cub." Pet. App. 27a.[6]

Together with its order, the District Court filed an opinion stating its findings of fact and conclusions of law. In that opinion, the District Court interpreted its TRO, in combination with its comments at the TRO hearing, to mean that "American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease." Pet. App. 33a. Thus interpreting the TRO, the District Court found petitioners in contempt in that APA had not accomplished that result in the 15½-hour period from February 10, 4:00 p.m. (when the TRO issued) through February 11, 10:50 a.m. (when American inventoried the sick list).

The District Court's findings focused almost exclusively on the APA's February 10 communication. Pet. App. 31a-34a. But, rather than treating that communication for what it was—an initial alert prefatory to the full February 11 notice of the TRO/return-to-work directive that would issue upon review of the TRO by counsel—the District Court determined that APA was required to discharge all of its notice of the TRO and return-to-work directive obligations within 3½ hours of the TRO's issuance, a requirement nowhere stated in the TRO itself, and that the February 10 communication was, on that interpretation of the TRO, seriously incomplete. Pet. App. 32a-33a. The District Court also focused on the

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[6] The District Court, continuing in its aggrieved complaining-party role, opined in its order that the APA had been taken over by a "radical element . . . determined to fly American Airlines . . . into the side of the mountain" and suggested that the APA membership should vote the national officer defendants out of office for this "fiasco." The order was also replete with images of organized crime, describing the sick-out as a "shakedown," "extortion," and "the type of negotiation one usually sees when doing business with one of the five families in New York." Pet. App. 24a-25a.

sentence in the February 10 communication that had defined the "defendants"—a term otherwise undefined in the TRO text quoted therein—and found that it "sen[t] the clear message that individual Union members were not covered." Pet. App. 32a.[7]

On these bases, the District Court concluded that the February 10 initial alert was "foreseeably ineffective" and that its ineffectiveness "was not only . . . foreseeable, it was intended." Pet. App. 33a.

Having treated APA's first word to its members as its last word, the District Court, in the two sentences devoted to the subject of APA's February 11 notice/return-to-work directives, concluded that these communications "came too little too late." Pet. App. 34a. And finally, that court found that that petitioners violated the "all reasonable steps" requirement because APA—which put out its notice of the TRO/return-to-work directive through the internet, telephone hotline, e-mail, and hard copies—used a "phone watch" to give members who called in notice of the TRO and direction to return to work rather than setting up a "phone bank" to make outgoing calls to the pilots. Pet. App. 35a.

*G. The "Damages" Proceedings.* The District Court set the damages hearing for February 17, without affording APA, LaVoy, and Mayhew discovery. Petitioners responded by moving to have the contempt judgment set aside on the grounds that the adjudication of contempt liability was "premature" and procedurally defective. R. 215-21. The District Court denied that motion and announced that the contempt issue could not be "relitigate[d]." Tr. (Feb. 17) 4. In the course of the hearing, however, the District Court

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[7] The District Court then faulted the initial alert for failing to include the complete text of the ordering paragraphs of the TRO, failing to include an instruction telling pilots to "resume their normal working schedule" and to "cease and desist" from engaging in the sick-out. Pet. App. 32a-33a.

permitted American, over objection, to supplement the record on contempt with five additional exhibits from the pre-TRO period. *Id.* at 57.

After American made its damages presentation, the District Court continued the hearing until April 12. During that period, the District Court allowed only "limited document discovery." *Id.* at 16-17, 60-61. And, when American moved to prohibit APA from calling a number of pilot witnesses on the ground that APA was "asking the Court to relitigate the issue of contempt," R. 678, 680, the District Court granted the motion and disallowed the proposed witnesses. Tr. (April 12) 23; *id.* at 33 ("I don't want to revisit the contempt").[8]

Notwithstanding this ruling, however, the District Court granted, over APA's objection, American's second motion to supplement the record of the February 12 contempt hearing with materials directly relating to contempt liability. R. 774, 702-773. These materials, in addition to those admitted on February 17, were later relied on by the District Court in its June 23 opinion to supplement its February 13 findings on contempt liability. Pet. App. 52a-53a, 62a-65a, 69a.

*H. The Damages Order and Final Opinion.* At the close of the damages hearing on April 15 the District Court assessed $45,507,280 in damages for the two-day February 10-February 12 period in which the court found the defendants in contempt. Tr. (April 15) 272.

On June 23, 1999, the District Court stated its judgment on damages in writing in a heavily revised and augmented opinion on liability as well as on damages. This lengthy

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[8] The District Court told APA's counsel that "probably all your sick pilots are going to get a chance to testify" in other lawsuits. Tr. (April 12) 32. Observing that the defendants were defending class actions filed by passengers, the court opined that APA members may possibly be held personally liable, "Now, if that's the case, all these folks are probably going to get a chance to have their depositions taken. That would preserve your record, and we can talk about that later." *Id.* 32-33.

opinion made new contempt findings based on the evidence that the District Court admitted after the February 12 contempt hearing, evidence which was not tested through examination in the crucible of a trial. *See* Pet. App. 52a-53a, 62a-65a, 69a.[9]

Petitioners timely appealed.

## II. THE COURT OF APPEALS' DECISION

In their appeal, APA, LaVoy, and Mayhew argued, insofar as is pertinent here, that the District Court's use of expedited procedure of a summary nature for determining liability for compensatory civil contempt damages violated the contempt/procedural due process principle enunciated in this Court's decision in *Mine Workers v. Bagwell*, 512 U.S. 821 (1994). The Court of Appeals rejected that argument in the following terms:

> Defendants argue that they were entitled to more process than they received during the contempt phase of this proceeding. As primary authority for this assertion,

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[9] Indeed, the June 23 decision rests in large part on a new theory of liability based upon American's untested post-February 12 evidence: In its February 13 contempt findings, the District Court rested its contempt findings on alleged sins of commission (*e.g.*, the language used by LaVoy and Mayhew in the February 10 alert) and on alleged sins of omission (*e.g.*, APA's failure to implement a "phone bank"). But in its revised opinion, that court found the APA's compliance actions inadequate and contemptuous by finding that the February 10 and February 11 communications were framed in "code language" whose true import was that the pilots should defy the TRO. Pet. App. 69a. This finding was based on the untested liability evidence submitted by American after the close of the February 12 hearing: e-mails sent by pilots and by local APA "domicile" officials. *Id.* The District Court, finding that these communications signaled to members that any APA post-TRO return-to-work directives should not be taken seriously, also found that APA's failure affirmatively to disavow such signals by using specific locutions such as "clear the sick list immediately" was itself an act of contempt. *Id.* at 53a, 66a, 72a-73a.

the defendants assert that the standard applied in *International Union, UMWA v. Bagwell*, 512 U.S. 821 (1994), should apply in the situation *sub judice*. We decline the invitation to apply the principle enunciated in *Bagwell* to civil contempt situations.

Contempt proceedings are naturally "summary in form and swift in execution." *Ryals v. United States*, 69 F.2d 946, 947 (5th Cir. 1934). The defendants' argument that they are entitled to what amounts to a full trial on the merits of their contempt charge is contrary to case law. *See, e.g., Placid Refining Co. v. Terrebonne Fuel & Lube*, 108 F.3d 609, 613-14 (5th Cir. 1997) (holding that civil contempt proceeding that gave "notice and an opportunity to be heard" was constitutional), *accord Alberti v. Klevenhagen*, 46 F.3d 1347, 1359 (5th Cir. 1995). [Pet. App. 16a-17a.]

## REASONS FOR GRANTING THE WRIT

This case presents in the most pointed fashion the one major contempt/procedural due process question left open in this Court's seminal decision in *Mine Workers v. Bagwell*, 512 U.S. 821 (1994): The question of the requisite procedures for hearing and deciding *compensatory civil contempt cases* bottomed on allegations of "out-of-court violations of a complex injunction," *Bagwell*, 512 U.S. at 837, *viz.*, the requisite procedures for the class of contempt cases that are "nominally those of contempt [but] really proceedings to award damages to the plaintiff" for past conduct, *Worden v. Searls*, 121 U.S. 14, 26 (1887).

The contempt power—particularly when exercised through expedited procedures of a summary nature—places the greatest strains on the rule of law and on the judicial branch as one of the three separate branches of government, each with delimited powers.

Given that strain and given the inherent human frailties of any trial judge who is faced with a supposed disobedience or

defiance of the judge's orders, throughout this century this Court has paid particular heed to the importance of procedural due process limitations on the contempt power compatible with the proper "balance [between] the competing concerns of necessity and potential arbitrariness." *Bagwell*, 512 U.S. at 831.[10]

And, given the delicate nature of that balance—as well as the stakes for the parties, for the trial courts, and for the fair and proper administration of the judicial system—we submit that the question presented here can no longer be left an open question but rather requires this Court's authoritative answer. Indeed, it is the Fifth Circuit's ill-considered answer to this question that presents the most compelling case for a well-considered answer by this Court.

The Court of Appeals ruled that compensatory civil contempt proceedings are "naturally 'summary in form and swift in execution,'" and that compensatory civil contempt defendants, in contrast to all other civil damages case defendants, are *not* entitled to the procedural due process that attends "a full trial on the merits of their contempt charge"—as provided for in the federal courts by the Federal Rules of Civil Procedure—but only to the expedited procedures of a summary nature offered by the "[s]imple," conclusory notice

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[10] This Court's modern contempt precedents progress from the early view that the contempt power is procedurally unbounded to a view that contempt proceedings, like judicial proceedings generally, must recognize the claims of due process. *See, e.g., Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911) (requiring proof beyond a reasonable doubt in criminal contempts); *Cooke v. United States*, 267 U.S. 517, 525 (1925)(requiring notice of charges and right to present a defense and have and assistance of counsel in criminal contempts); *Bloom v. Illinois*, 391 U.S. 194 (1968) (requiring jury trial for "serious [criminal] contempts"); and *Bagwell*, 512 U.S. at 836-37 (holding that fixed, non-compensatory fines for out-of-court violations of complex injunctions cannot be imposed absent criminal procedural protections).

and the immediate, next-day hearing provided here. Pet. App. 17a .

In so ruling, the court below "decline[d] the invitation to apply the principle enunciated in *Bagwell* to civil contempt situations," and instead relied entirely on Court of Appeals cases that in no way support the proposition that a party may be found liable for, and sanctioned with, massive compensatory contempt damages for past conduct absent full civil due process. Pet. App. 16a.[11]

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[11] *Ryals v. United States*, 69 F.2d 946, 947 (5th Cir. 1934), is a museum piece whose obsolescence is proved by *Bloom v. Illinois*, 391 U.S. 194 (1968). *Ryals* was a criminal contempt case in which the trial court summarily adjudged the defendant in contempt for assaulting a court officer and imprisoned him for one year without a charge, a jury trial, findings of fact, or a judgment of guilt. The Court of Appeals reversed, requiring "a formal charge, a hearing before the court, and a formal judgment of guilt," but not a jury trial. Under *Bloom*, an alleged criminal contempt and a punishment of one year's imprisonment is not subject to "summary . . . and swift" adjudication at all but to a full trial by jury.

Aside from drawing on *Ryals* for its general—and entirely anachronistic—language, the Court of Appeals cited three cases to justify eschewing analysis under this Court's "*Bagwell* principle," *viz.*, that due process in the context of the contempt power requires a "balance" between "the competing concerns of necessity and potential arbitrariness," 512 U.S. at 832:

- *Placid Refining Co. v. Terrebonne Fuel & Lube*, 108 F.3d 609, 613-14 (5th Cir. 1997), was cited for the proposition that a "civil contempt proceeding that gave 'notice and an opportunity to be heard' was constitutional." Pet. App. 17a. In fact, that case held that a compensatory civil sanction of attorney's fees and costs, entered "[a]fter extensive discovery and a hearing on the merits," *id.* at 612, was constitutional.

- *Alberti v. Klevenhagen*, 46 F.3d 1347, 1359 (5th Cir. 1995), cited as in "accord" with *Placid Refining*, was a *coercive* civil contempt case, which under the *Bagwell* principle eschewed by the Court of Appeals, is a class of cases entirely distinct from *compensatory* civil contempt cases. *See infra* pp. 24-26.

The decision below could not be more wrong in its holding. The proposition that a compensatory civil contempt defendant facing a complex legal claim that rests on the proof of crucial disputable facts as to events that have occurred in the past and that entails millions of dollars of potential liability—here, $45,500,000—is not entitled to the basic procedural protections accorded all other civil-damages case defendants cannot be squared with the "principle [of] *Bagwell*" and defies every due process precept.

Nor could the decision be more wrong in its method. Simply stated, the Courts of Appeals are not entitled to decide legal questions by cavalierly dismissing the principles enunciated in this Court's decisions and by placing their reliance on inapposite lower court precedents. That is particularly so where, as here, the decision breaks faith with this Court's contempt/due process precepts and with the general understanding that in the Federal Courts, civil contempt liability proceedings are to be adjudicated in accordance with the due process benchmark provided by the Federal Rules of Civil Procedure. *See, e.g., Rogers v. Webster*, 776 F.2d 607, 610 (6th Cir. 1985) ("Civil contempt is a civil proceeding governed by the Federal Rules of Civil Procedure.").

And, it is difficult to see how a post-*Bagwell* contempt/due process decision could be more far-reaching in its mischievous potential. The Virginia courts' aggressive

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• *United States v. Powers*, 629 F.2d 619 (9th Cir. 1980) (cited for its "simple notice" statement) is a non-summary criminal-contempt case involving a "discrete readily ascertainable" fact (a witness's failure to appear), and again under the *Bagwell* principle, is inapposite. Moreover, the *Powers* court went on to say: notice must "inform the contemnor of the nature of the charge and enable the contemnor to prepare a defense," that a "reasonable" notice period varies with the circumstances, and that a five-day notice period (borrowed from Criminal Rule 45(d) and Civil Rule 6(d)) should apply absent "a compelling need to shorten the time." *Id.* at 625.

attempt in *Bagwell* to expand coercive civil contempt made it all but certain that trial judges could—and thus would—hold parties in contempt and impose monetary penalties through expedited procedures of a summary nature, thereby dispensing with any need to invoke criminal contempt with its attendant procedural due process complexities and its due process protections against abuse of the contempt power. The Fifth Circuit's aggressive expansion of compensatory civil contempt is of the same order: The Court of Appeals' decision opens the widest alternate leeway for the very abuse of the contempt power that *Bagwell*'s criminal contempt/due process holding is intended to preclude: adjudication by the judge who has issued a complex injunction—outside the institutionalized procedures for the even-handed administration of the law—of claims of out-of-court disobedience of that injunction with the end in view of imposing substantial monetary liability on the defendant.

As this case shows, the costs of opening that leeway are great. We are, of course, most mindful of the multimillion dollar judgment in this case issued without the process that is deemed due to defendants facing large damages claims—and far smaller ones. But, given the nature of the contempt power and its potential for abuse, the harm worked by the decision below to the interest in ensuring even-handed use of judicial power and to the federal court civil justice system—while immeasurable—is far greater still.

In schematic terms, the multimillion dollar retrospective compensatory damages case here and the multimillion dollar retrospective fine case in *Bagwell* were means of adjudicating indirect contempts through expedited proceedings of a summary nature. The Virginia courts "levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction" without observing the procedures that due process requires in ordinary criminal proceedings. So here, the District Court awarded compensatory damages for such "out-

of-court violations of a complex injunction" without observing the procedures that due process requires in ordinary civil proceedings.

The results in the Virginia courts and in the courts below here were predictably similar—a judicial finding of liability and the consequent imposition of a multimillion dollar judgment. And, those results are contrary to the genius of the judicial system as a justice system and to this Court's contempt/due process jurisprudence as most recently elaborated in *Bagwell*.

In sum, all of the considerations that called for a grant of *certiorari* in *Bagwell*—together with the added considerations of safeguarding the vitality and integrity of the Court's decision in that case and of assuring the fair and even-hand administration of the law by the Federal Courts—call for a grant of *certiorari* in this case.

II

The *Bagwell* litigation was, of course, focused by an ongoing dispute as to whether scheduled non-compensatory fines for violations of a complex injunction were properly characterized as forward-looking, coercive civil sanctions—requiring only expedited proceedings of a summary nature—or as retrospective sanctions for " 'completed act[s] of disobedience,' such that the contemnor cannot avoid or abbreviate the [punishment] through later compliance"—requiring full criminal procedure. 512 U.S. at 828-29 (quoting *Gompers*, 221 U.S. at 443).

Consequently, the *Bagwell* opinion treats with the requisite procedures in compensatory civil contempt cases only in passing and in the most general terms.[12] And, the *Bagwell*

[12] *See* 512 U.S. at 838 ("Our holding [that non-compensatory fines cannot be imposed for out-of-court disobedience of complex injunctions absent a jury trial and other criminal procedural protections] leaves

holding—that such retrospective non-compensatory sanctions can *not* be imposed absent full criminal due process—does not in terms determine what process is due *on the civil side* where a party faces allegations of "out-of court disobedience to a complex injunction" and where the remedy meted out is not a forward-looking coercive sanction but rather a non-purgable retrospective award of compensatory damages for past acts of alleged disobedience.

But, it is our submission that the *Bagwell* analysis, and the *Bagwell* principle crystallized by that analysis, do dictate the answer to the contempt/due process question here as well as to the question posed in *Bagwell* itself. The very analysis and the very principle that led this Court to conclude that the non-compensatory $52,000,000 sanctions in *Bagwell* could not, consistent with due process, be imposed absent full *criminal* due process also resolutely counsel that the $45,500,000 compensatory contempt sanction imposed here could not, consistent with due process, be imposed without full *civil* due process in the form of the "full trial on the merits" that the Court of Appeals held was *not* necessary here.

(1) *Bagwell* addressed "the ultimate question" posed by any contempt/due process case: "what procedural protections are due before any particular contempt penalty can be imposed." 512 U.S. at 830-31. This "ultimate question," the Court explained, requires careful attention both to the purpose of the contempt power and to its inherent dangers. In this regard, the Court observed first that:

> [t]he traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and ... to preserve themselves and their officers from the approach and

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unaltered the longstanding authority of judges . . . to enter broad compensatory awards for all contempts through civil proceedings.").

> insults of pollution." *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821). [512 U.S. at 831.]

And, the Court then added that:

> the contempt power also uniquely is "liable to abuse." *Bloom*, 391 U.S., at 202, quoting *Ex parte Terry*, 128 U.S. 289, 313 (1888). Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy "often strikes at the most vulnerable and human qualities of a judge's temperament," *Bloom*, supra, at 202, and its fusion of legislative, executive, and judicial powers "summons forth . . . the prospect of 'the most tyrannical licentiousness.'" *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 822 (1987) (SCALIA, J., concurring in judgment), quoting *Anderson*, 6 Wheat., at 228. [512 U.S. at 831.]

All this being so, the Court's "jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play." 512 U.S. at 832.

Having set forth the considerations that must be weighed in determining the appropriate level of procedural due process, the *Bagwell* Court put the matter in concrete terms by stating the paradigm case for necessity and the paradigm case for the most exacting procedures:

"The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the

court." 512 U.S. at 832-33. This judicial "power of self-defense"—permitting the immediate summary adjudication of such "direct" contempts provided that the court does not mete out "serious" punishment—has "been tolerated" because "of the court's substantial interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive factfinding and the likelihood of an erroneous deprivation." *Id.*

But "[s]ummary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts." 512 U.S. at 832. And, "further procedural protections are afforded for contempts occurring out of court, where the considerations justifying expedited procedures do not pertain." *Id.* at 833. "For a discrete category of indirect contempts"—those "involving out-of court disobedience to complex injunctions," *id.*, and the imposition of "serious criminal penalties" including "determinate, retrospective criminal fines which [the defendant party] had no opportunity to purge once imposed," *id.* at 837—concerns of potential arbitrariness are preeminent. Because such cases "often require elaborate and reliable fact finding," and because the alleged contempts themselves "do not obstruct the court's ability to adjudicate the proceedings before it," this Court observed, "the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial." *Id.* at 834.

Hence, *Bagwell* holds that such contempts require the full protections normally incident to the criminal process: "Under these circumstances, criminal procedural protections ... are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." 512 U.S. at 834. "Where, as here, 'a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.' " *Id.* at 839 (quoting *Bloom*, 391 U.S. at 209).

(2) Compensatory civil contempt cases "are essentially backward looking, seeking to compensate the complainant through the payment of money for damages caused by past acts of disobedience." *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1344 (3d Cir.1976). In their retrospective nature, compensatory civil contempt cases are analogous to criminal contempt cases: both sanction the contemnor for a completed act and neither permits the contemnor to "avoid or abbreviate" any threatened sanction "through later compliance." *Bagwell*, 512 U.S. at 828-29.[13]

For this very reason, compensatory civil contempt in no way implicates the countervailing judicial "necessity" concerns that, as *Bagwell* makes clear, provide the sole justification for resort to expedited process of a summary nature and for departing from the due process guarantees that attend ordinary civil (or ordinary criminal) actions.

It is equally to the point that the other *Bagwell* considerations—those that go to the need for "elaborate and reliable factfinding"—also forcefully counsel against the kind of expedited process of a summary nature by which this compensatory civil contempt case was dispatched.

First, the proceedings here clearly involve alleged "out-of-court disobedience of a complex injunction" within the intendment of *Bagwell*. The TRO's terms required the APA and its officers to issue their notice and return-to-work directives through manifold media in order to reach its 9,300 pilot members scattered throughout the country, and to otherwise use "all reasonable steps within their power" to effectuate an end to the sick-out. Moreover, as the District Court read the TRO, it required that "American Airlines planes . . . start flying again immediately" and required too

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[13] *See also* Doug Rendleman, "Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction," 1980 U. Ill. L. Forum 971 (1980) ("Judges use criminal and compensatory contempt when it is too late to coerce the defendant into the desired mode of conduct.").

that the sick-out "must immediately cease." Pet. App. 32a, 33a, 50a. It should be needless to say that such commands raise substantial issues of compliance, of ability to comply, and of agency. This case is at the other extreme from those "involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," in which "the need for extensive, impartial factfinding is less pressing." *Bagwell*, 512 U.S. at 833.

Second, and of equal moment, this case points up the unique dangers of the contempt power, and bears out most vividly this Court's admonition that "contumacy"—whether real or perceived—"often strikes at the most vulnerable and human qualities of a judge's temperament." 512 U.S. at 831 (quoting *Bloom*, 391 U.S. at 202). The District Court's assertion of the role of an active—and actively aggrieved—complaining party, *see supra* pp. 9-10, proves again the concern that "[w]hen the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true . . . . He truly becomes the judge of his own cause." *Green v. United States*, 356 U.S. 165, 199 (1958) (Black, J., dissenting).[14]

In sum, in compensatory civil contempt proceedings such as the one at issue here, there is *no* judicial necessity that permits departure from the incidents of civil due process applicable in all civil damages proceedings. And, there is every potential for unfairness to alleged contemnors from using the precipitate process utilized by the District Court here to determine the complex legal and factual issues as to compliance with a court order and as to damages resulting

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[14] *Green*'s holding that a jury trial is not available in criminal contempt was overruled by the Court ten years later in *Bloom*, 391 U.S. at 199, a decision that vindicated Justice Black's *Green* dissent.

from non-compliance, particularly where great financial consequences can weigh in the balance.[15]

(3) To put the foregoing in proper perspective, we hasten to add that civil contempt is not a unitary category and that expedited procedures of a summary nature *are* proper in *coercive civil contempt* cases. Whereas compensatory civil contempt provides retrospective relief, "[c]oercive sanctions, in contrast, look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the court order." *Latrobe Steel*, 545 F.2d at 1344. In such proceedings, the "necessity" side of the balance tips heavily in favor of abbreviated process to meet the exigency of continuing or threatened court-order disobedience and to secure prompt obedience to the order.

And, on the other side of the balance, "potential arbitrariness" is alleviated by the unique characteristics of the coercive civil contempt regime. That regime entails a three-stage process, consisting first of the issuance of the underlying order (such as the TRO here); second, an expedited hearing leading to a "conditional order finding ... contempt" and threatening conditional sanctions for the defendant's failure to carry out the court's specific commands as spelled out in the contempt order; and third, imposition of the threatened penalty, after due notice and a hearing, if the party fails to comply. *See, e.g., NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981).

The defining feature—and the saving grace—of coercive civil contempt regime is that the initial finding of contempt is both *conditional and prospective*, allowing the defendant an opportunity to purge through compliance and avoid the

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[15] And, as the D.C. Circuit noted decades before *Bagwell*, "Certainly the history of contempt litigation, especially in regard to labor disputes, prescribes extreme care and insistence on the full indicia of due process in contempt cases." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 380 F.2d 570, 582 (D.C. Cir. 1967).

sanction. *See Bagwell*, 512 U.S. at 828-29; *Shillitani v. United States*, 384 U.S. 364, 366-69 (1966). The danger to alleged contemnors and to the integrity of the civil justice system inhering in the summary part of this procedure is thus mitigated by the provisional nature of the contempt finding, the additional specification of the actions required to satisfy the underlying order, and the opportunity to "purge" the contempt.

Such coercive civil contempt cases stand on an altogether different footing from the instant compensatory civil contempt case, where the objective of the proceeding is not to secure compliance with a court order under the exigent circumstances of a continuing violation, but rather to provide a retrospective damages remedy for past disobedience. There is, therefore, no judicial "necessity" consideration that justifies the truncated process that the District Court held here.

(4) In the Federal Courts, the benchmark for full civil due process is provided by the Federal Rules of Civil Procedure. As this Court recently pointed out, the Federal Rules, particularly those ensuring "a proper opportunity to respond" to a claim, "are designed to further the due process of law that the Constitution guarantees." *Nelson v. Adams USA*, 120 S. Ct. 1579, 1584 (2000).

Because the Federal Rules of Civil Procedure embody the basic due process requirements for adjudicating civil cases in the Federal Courts and do so in a way that strikes a balance between the need for fair and reliable fact finding on the one hand and reasonable promptness in the resolution of civil disputes on the other, there are compelling reasons to follow those Rules in this context, and no reason not to. And, there can be no question in this case that neither the Federal Rules nor due process principles "countenance such swift passage from pleading to judgment in the pleader's favor," *Nelson*, 120 S.Ct. at 1584, as occurred here.

The Federal Rules—at their most irreducible minimum—require three procedural protections that were not afforded to APA, LaVoy, and Mayhew in the this case: (1) enough notice of the nature and particulars of the claim to afford a meaningful opportunity to respond, (2) sufficient time to prepare a defense to a claim, and (3) a reasonable opportunity for discovery.

The Federal Rules, first, contemplate that a party be apprised of the nature and particulars of a claim for relief asserted against that party. Whether measured by the motion standard of Rule 7(b)(1) (requiring a party to "state with particularity the grounds" for the relief sought) or the pleading standard of Rule 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"), that notice must at least permit the party against who the claim is made to prepare an adequate defense. *See Conley v. Gibson*, 355 U.S. 41, 58 (1957) (Federal rules require "fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

The Federal Rules, furthermore, contemplate "time and opportunity to respond to" a claim. *Nelson*, 120 S. Ct. at 1584. In a civil case for damages allegedly caused by the defendant's completed acts, the Federal Rules set up a framework by which the litigation progresses toward a trial on the merits—beginning with an answer, then discovery, and then pretrial proceedings—and do not provide for a simple general notice on day one and an immediate dispositive liability hearing on day two.

By dispensing entirely with these minimum due process requisites—on no basis other than its misunderstanding that the civil contempt power in all its manifestations is "naturally 'summary in form and swift in execution'"—the Fifth Circuit's decision is incompatible with the fair and even-

handed administration of the law in a way that calls for this Court's correction.[16]

## CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully Submitted,

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[16] In the interest of completeness, and so that we neither overstate nor understate the ramifications of the major proposition we have argued—that compensatory civil contempt cases are in the class of civil damages cases and subject to the due process regime that governs that class of cases—we note that this proposition suggests that, in the Federal Courts, such cases are, by reason of the Seventh Amendment, subject to the protection of a jury trial. That suggestion depends not only on the foregoing proposition being judged to be correct but also on the complexities of characterizing, for Seventh Amendment purposes, actions different in kind from those known to Eighteenth Century England. *See, e.g., City of Monterey v. Del Monte Dunes, Ltd.*, 119 S.Ct. 1624 (1999); *Teamsters v. Terry*, 494 U.S. 558 (1990). Since the Court has not passed on the correctness of our submission; since the courts below rejected our submission without exploring a jury trial issue and that being so, no jury trial issue has been explored in the courts below; and since the issue has its own complexities, we merely put this place marker on it for the purpose of the proceedings in this Court.

## ADDENDUM

**Text of the District Court February 10, 1999 Temporary Restraining Order.**

IT IS ORDERED, that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained pending a hearing on the preliminary injunction in this matter:

(a) From calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C., §§ 151-188 (1988).

AND IT IS FURTHER ORDERED:

(b) That the said Defendants and said other persons acting in concert with them shall take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions if commenced.

(c) That the said Defendants shall instruct all pilots to resume their normal working schedule, and provide Plaintiff a copy of all such instructions.

(d) That APA and the individually named Defendants notify, by the most expeditious means possible, all APA-represented pilots employed by American of the issuance, contents and meaning of this Temporary Restraining Order, and produce a copy of all such messages to Plaintiff.

(e) That the notice described in (d) above include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist

all such activity and to cease and desist all exhortations or communications encouraging same.

(f) That APA and the individually named Defendants post the notice described in (d) above to APA's Internet web site, and provide a copy of the notice to the Plaintiff.

(g) That APA and the individually named Defendants include the contents of the ordering paragraphs of this Order on all recorded telephone hotlines under control of Defendants or any of them, until such time as the Court has acted on Plaintiff's Motion for a Preliminary Injunction, and provide a copy of all messages to the Plaintiff.

(h) That APA and the individually named Defendants report by 12:00 noon on February 12, 1999, by sworn affidavit, the methods used to effect the notice described in (d) above to all APA-represented pilots.

(i) All copies required to be furnished to the Plaintiff by Defendants under this Order shall also be contemporaneously furnished to the Court.